

(1998) 08 GUJ CK 0035
In the Gujarat High Court
Case No : First Appeal No. 1075 of 1988

Government of Gujarat

APPELLANT

Vs

Shivabhai S. Makwana

RESPONDENT

Date of Decision : 15-08-1998

Acts Referred:

Constitution of India, 1950 — Article 309

Gujarat Civil Services (Conduct) Rules, 1971 — Rule 26, 29, 3, 3(1)

Citation : (1999) 1 GLR 881

Hon'ble Judges : S.K. Keshote, J

Bench : Single Bench

Advocate : Mukesh A. Patel, for the Appellant; K.D. Vasavada, for the Respondent

Judgement

S.K. Keshote, J.—This appeal by the State of Gujarat and Dy. Commissioner of Police, Shahibaug, Ahmedabad is filed against the judgment and decree dated 29-4-1988 passed by City Civil Judge, Court No. 9, City Civil Court at Ahmedabad in Civil Suit No. 5886 of 1986 under which the suit of the plaintiff-respondent since deceased, now represented by his legal heir, has been decreed and his dismissal from the services was declared to be illegal and void and he was ordered to be reinstated back in service with full benefits subject to withholding of two grade increments by way of punishment in respect of first charge.

2. The facts of the case are that the plaintiff since deceased, now represented by his legal heir (hereinafter referred to as the respondent) was serving as a unarmed police constable in the office of the Police Commissioner, Ahmedabad from 28-2-1980. From 2-6-1980 he was posted in Traffic Branch. Vide memo dated February, 1982 of Deputy Commissioner of Police, Shahibaug, Ahmedabad a charge-sheet was served to the respondent for his misconduct of abusing language and for having been found under the influence of liquor, and for the charge of taking of liquor. A criminal case has also been registered against him in

which he was acquitted on 17-1-1992 by the Chief Metropolitan Magistrate, Ahmedabad. On the same charge, the respondent stated in the suit that the Deputy Commissioner of Police punished him after holding a department inquiry vide order dated 24-7-1985 by penalty of withholding two grade increments and treating the period of suspension without pay. Against this charge-sheet and penalty imposed, the respondent made the grievances namely, (i) once he has been acquitted in the criminal case he could not have been suspended for same charge in departmental inquiry, (ii) the entire period of suspension after his acquittal in criminal case could have been treated as period on duty. (iii) the charge framed against him is not proved. In the suit, the prayer has been made for declaration of the order of penalty and charge-sheet as are being bad in law and against the principles of natural justice. The respondent then comes up with the further case that after he has been punished for alleged misconduct in first charge-sheet he was served with another charge-sheet in which the misconduct alleged against him as that "unbecoming of the Government servant". In second charge-sheet, the alleged misconduct against the respondent was that he was keeping a mistress. That charge was found proved against him in the department inquiry and the penalty of dismissal from services has been given. That order of dismissal and charge-sheet were also subject-matter of challenge by the respondent in the civil suit.

3. The suit has been contested by the appellants and on the basis of the pleadings of the parties, learned trial Court framed as many as ten issues in this case, which reads as under :

1. Has the Court no jurisdiction to try the suit ?
2. Whether the plaintiff proves that order of the defendant No. 2 of relating the entire period of suspension without pay is illegal ?
3. Whether the plaintiff proves that order of the suspension by Deputy Commissioner of Police is illegal ?
4. Whether the plaintiff proves that the order of finding him guilty of abusive language is against the principles of natural justice and hence bad in law ?
5. Does the plaintiff prove that in enquiry for the second charge of "unbecoming of a Government servant", he was wrongfully deprived of the right of cross-examination by the friend, therefore, denied his right to make proper defence in the charge against him ?
6. Whether the plaintiff proves that in case of second charge defendant No. 2 has not followed the proper procedure ?
7. Whether the plaintiff proves that the second charge is wrongfully held proved against him ?
8. Is the plaintiff entitled to declaration sought in plaint para 18(1) ?
9. Is the plaintiff entitled to declaration sought in plaint para 18(2) ?

10. What order and decree ?

4. After considering the evidence produced by both the parties, the learned trial Court decided issue Nos. 1 to 6 and 8 in negative and Issue Nos. 7 and 9 in affirmative.

5. Learned trial Court so far as the first charge-sheet and penalty given on proof of the same of withholding of two grade increments was held to be valid and no interference has been made. So far as the second charge-sheet is concerned, the punishment given on proof thereof of dismissal of respondent from services, the learned trial Court has held that even if the second charge is taken to be proved, it cannot be said that the same constitutes misconduct (unbecoming of Government servant). Taking into consideration this fact, learned trial Court held that the respondent could not have been punished and consequently the order of dismissal of respondent from services was declared to be invalid, inoperative and accordingly relief has been granted. Hence this appeal before this Court.

6. Learned Counsel for the defendants appellants contended that keeping of mistress by the Government servant is a serious misconduct and it constitutes a misconduct (unbecoming of Government servant). The charge of keeping mistress as alleged against the respondent (since deceased) has been proved in the departmental inquiry and on proof of that charge as it amounts to unbecoming of a Government servant, the respondent has rightly and legally been ordered to be dismissed from the services. Learned Counsel for the appellants urged that the decision of the learned trial Court that keeping of mistress by Government servant does not constitute a misconduct (unbecoming of Government servant) and even if this charge is proved, the respondent could not have been dismissed from services is wholly erroneous in view of the latest pronouncement of the Apex Court in the case of Ministry of Finance and Another Vs. S.B. Ramesh, . Carrying this contention further, learned Counsel for the appellants submitted that the judgment on which reliance has been placed by the learned trial Court to decide Issue No. 7 in favour of the respondent is not applicable to the facts of the present case or otherwise also in view of the latest pronouncement of the Apex Court in the case of Ministry of Finance & Anr. v. S. B. Ramesh (supra) that judgment no more now holds any field.

7. On the other hand, the Counsel for the respondent very fairly conceded that in view of the decision of the Apex Court in the case of Ministry of Finance & Anr. v. S. B. Ramesh (supra) keeping of mistress constitutes a misconduct (unbecoming of Government servant) but his contention is that this Court may take a liberal view in the matter and further taking into consideration the fact that this decree has been passed by the trial Court on 29-4-1988 and this Court on 30-6-1989 specifically directed the appellants to deposit within eight weeks from the date of order the entire amount of back wages payable to the respondent upto the date of decree in the trial Court, which order has not been complied with and further order of this Court dated 6-5-1997 too has not been complied with, this Court may not interfere in the matter. Learned Counsel for the respondent has also

made a feeble attempt to challenge the finding of the trial Court recorded on Issue Nos. 5 and 6 but after the statements of respondent made by him in the departmental inquiry were read by the learned Counsel for the appellants, he has given up his challenge to the finding of the trial Court on these issues.

8. I have given my thoughtful consideration to the submissions made by the learned Counsels for the parties.

9. During the course of arguments, learned Counsel for the appellants read before this Court the statements of Bai Shanta Kantaben and statement of respondent himself recorded in the departmental inquiry. The respondent in his statements admitted his illicit relation with the said lady and keeping her as mistress. Not only this, he made a further statement that he has no objection in case that lady continues to remain with him. From his these statements, I find a clear admission made by him of his misconduct, which is alleged against him in the second charge-sheet. In view of this admission of the delinquent-respondent himself of the misconduct as well as the statements of lady, I do not find otherwise also any merits in the challenge made by the learned Counsel for The respondent to the findings of the learned trial Court recorded on Issue Nos. 5 and 6. The admission is the best and substantive piece of evidence and even if it is taken though it is not accepted that there was some-error by inquiry officer or illegality committed by the inquiry officer in conducting the departmental inquiry, still it will not materially affect the final decision taken by the disciplinary authority.

10. Learned trial Court has made reference to the decision of this Court in the case of Bodu Tarmamad Vs. Dt. Supdt. of Police, Jamnagar and Another, . After referring that decision, the learned trial Court held that after considering all the rulings, it is clear that even if charge as raised in the second charge-sheet is held as proved against the respondent herein, it cannot be said that the same constitutes misconduct (unbecoming of Government servant). It is further held that when this is so, the plaintiff cannot be punished on such charge in second charge-sheet. The learned trial Court said that even if second charge is held as proved against the respondent (plaintiff therein) it cannot be said that same constitutes a misconduct, "unbecoming of a Government servant". The Court further held that when it is so the plaintiff cannot be punished on such charge. So the judgment of the trial Court proceeded on the fact that keeping of mistress by a Government servant does not constitute misconduct (unbecoming of Government servant).

11. However, on merits it is not the finding of the trial Court that the charge of keeping of the mistress by the respondent is not proved.

12. The trial Court has proceeded on the fact that this charge as alleged against the plaintiff-respondent is proved but it will not constitute the misconduct (unbecoming of Government servant).

13. First of all, I consider it to be appropriate to deal with the decision of this

Court in the case of *Bodu Tarmamad v. D.S.P., Jamnagar (supra)*. In this case the allegation against the petitioner therein was that he being a married man and yet without performing any marriage ceremony either as per Hindu rites or according to Mohammedan religion, allowed a Hindu girl Bai Samu to stay with him in the Police line quarters. This conduct of the petitioner in that case was alleged as an act of immorality and against discipline, normal conduct and not befitting to a police officer who is a member of the disciplined force. The second charge against the petitioner in that case was that he allowed the said Hindu girl, who was stranger, to stay with him in the Police line quarters without obtaining permission of any officer of the department and it was alleged to be an act of serious breach of the rules. In that case, the contention raised from the side of the department that if a married man allows an adult unmarried girl to stay in his quarter it would amount to having a kept with him, therefore, this would amount to misconduct as contemplated in Rule 3(1)(iii) of the Gujarat Civil Services (Conduct) Rules, 1971. This contention of the department was not accepted by this Court. In that case on the ground that the charge against the petitioner that he had allowed or had permitted a concubine to stay in the Police line quarters was not there and the charge was, what the Court said, simple enough that he was a married man and yet he allowed a Hindu girl to stay with him in the police line quarters without performing the marriage ceremony either as per Hindu rites or Mohammedan religion and the Court has proceeded to decide whether even if this charge is proved can it be said to be a misconduct.

14. In para 11 of the judgment, the learned Judge has referred to the contention of the learned Counsel for the petitioner therein that even if the disciplinary authority thought that what the petitioner did was improper, the same cannot be considered as "unbecoming of a Government servant" unless that particular conduct is specified as misconduct in the relevant Rules. The decision of the Apex Court in the case of *Rasiklal Vaghajibhai Patel Vs. Ahmedabad Municipal Corporation and Another*, cited by the learned Counsel for the petitioner therein has been reproduced.

15. In para 12 of the judgment, reference has been made by the learned single Judge to the decision of this Court in the case of *Karsanbhai D. Parmar & Ors. v. State of Gujarat & Ors.*, 1986 GLT 87. In that case, the aforesaid decision of the Apex Court has been followed. In the case of *Karsanbhai D. Parmar & Ors. v. State of Gujarat (supra)*, the learned single Judge of this Court observed that to keep a mistress is not a misconduct for a policeman, and whatever is immoral or improper in a given society can not necessarily be branded as misconduct. Learned Counsel who was appearing for the department in that case contended that the observations of the Apex Court's in the case of *Rasiklal v. Ahmedabad Municipal Corporation (supra)* have been applied out of context by this Court in *Karsanbhai D. Parmar & Ors. v. State of Gujarat. (supra)*. It has further been contended that it would be improper for a Government servant to keep a mistress and such conduct would certainly be unbecoming of a Government servant. In that case this Court has proceeded with this clear case that therein

the charge against the petitioner was not that he was keeping a mistress. Relevant portion of the judgment from para 12 reads as under :

"Moreover, the observations of the Supreme Court in the case of Rasiklal (supra) have been applied out of context. In his submission it would be improper for a Government servant to keep a mistress and such conduct would certainly be unbecoming of a Government servant. Be that as it may. That is not the case before me. Therefore, even if the correctness of the aforesaid decision of this High Court is doubted, the principles laid down by the Supreme Court in Rasiklal's case (supra) are required to be followed and applied."

16. From the reading of this judgment, I have no doubt in my mind that it is not the decision of the Court that where a Government servant keeps a mistress, this conduct of his would not amount to a misconduct, unbecoming of a Government servant. Learned Judge while dealing with that case has clearly drawn a distinction where the charge against a Government servant is of keeping a mistress, such conduct would certainly be "unbecoming of a Government servant", if it is proved. So on the facts, the case on which the strong reliance has been placed in this case by the learned trial Court is clearly distinguishable. Learned trial Court has also placed reliance on other decision of this Court, reference of which has been made in the judgment aforesaid by this Court but in this judgment the Court has not specifically approved the decision given in the case of Karsanbhai D. Parmar v. State of Gujarat, (supra).

17. Gujarat Civil Services (Conduct) Rules, 1971 framed under Art. 309 of the Constitution applies to all the persons appointed to the civil services and posts in connection with the affairs of the State of Gujarat whose conditions of services are regulated in accordance with the rules made under Art. 309 of the Constitution.

18. Rule 3 of the Rules, 1971 requires that every Government servant shall all the time maintain absolute integrity, maintain devotion to duty and do nothing which is unbecoming of a Government servant. Rule 26 of the Rules, 1971 prohibits Government servant from entering into or contracting a marriage with a person having his spouse living and no Government servant having his spouse living shall enter into or contract a marriage with any person. Proviso to this Rule provides that the State Government may permit a Government servant to enter into, or contract, any such marriage as is referred to in Sub-rules (1) and (2) of this Rule if it is satisfied that such marriage is permissible under the personal law applicable to such Government servant and either party to the marriage and there are other grounds for doing so.

19. Rule 26-A of the Rules 1971 provides that every Government servant shall ensure that the number of his children does not exceed three.

20. Section 5 of the Hindu Marriage Act, 1955, provides for conditions for Hindu Marriage. A marriage may be solemnized between two Hindus if neither party has his/her spouse living at the time of marriage. The other condition for a Hindu

valid marriage as provided u/s 5 of the Act aforesaid need not be mentioned as the same are not relevant for the purpose of the present case.

21. Section 494 of the Indian Penal Code makes a provision for punishment for bigamy, which reads as under :

"Whoever, having a husband or wife living, marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife, shall be punished with imprisonment of either description which may extend to seven years, and shall also be liable to fine".

22. From the scheme of Rules 1971, the Hindu Marriage Act and Indian Penal Code, I find that the intention of legislature or rule making authority is that the second marriage should be discouraged. The second marriage where living spouse is there has socio-economic difficulties as well as it is also felt not necessary to maintain cleanness of character of people. In the case of a Government servant, plural marriage is prohibited and prevention of bigamous marriage as a condition of public service has relation with integrity of a Government servant. It need not necessarily be so direct and proximate. Having two or more wives in a time which may result into a large family which in all probability demand of the government servant larger resources for maintaining his two wives and their off springs. One of the major reasons of corruption amongst Government servants and officers in the country is demand of larger resources for maintaining their family. Looking to the recent index of prices of essential commodities, standard of living and multifarious need of physical comforts like coolers, air-conditioners, heat-converters, automobiles, manifold household articles, electronic equipments like T.V., V.C.R., Video Games, etc., decent food, clothes, decent living in house, and above all, desire of having lunch/dinners in good hotels and restaurants, and further desires of travelling throughout the country has tremendously increased the demands of Government servant of larger resources to have the things aforesaid. In this context if a Government servant has entered into or contracted a second marriage, then it is a matter of experience to what extent his demand of larger resources will be there. Similar may be the case with a Government servant who keeps a mistress or concubine. Naturally, in such case, he will require two houses and it needs larger resources for their needs. Whatever income he receives as salary may not be sufficient to meet out the expenses of family what to say of expenses of second house where he has to keep his mistress or concubine and naturally for maintaining the second house he has to indulge in other means of earning and that is only possible when he starts to do malpractice or starts to take illegal gratification or to commit frauds. In either way, it is not in the larger interest of service as well as society. To keep services clean and free from corruption and to avoid it of being polluted by unscrupulous employees, it is utmost necessary and foremost essential that the Government servant should not enhance their demands and expenses. It is true that heavy expenses of bare necessity of livelihood are to be borne out and the Government servant has to arrange his

expenses within four corners of his receipts. In case he has undertaken extra expenses for fulfilment of his lust and luxury then certainly he has to indulge in some illegal activities, malpractice and corruption. In a case where the Government servant is found keeping a mistress or concubine, it should not have been taken lightly and on proof thereof, it is certainly a case which falls under the category of unbecoming of a Government servant and he should have been severely dealt with. Extra-marital relations by a Government servant is certainly not only objectionable for keeping the service clean and free from being polluted by corruption etc. but also in the larger interest of his own family and society. It is not the only reason why the Parliament has prohibited second marriage in society and by rule making authority a person who is having two wives to be ineligible for appointment in public employment, but also with an objective to safeguard interest of women and larger interest of society and nation.

23. In the case of Ministry of Finance & Anr. v. S. B. Ramesh, (supra), the Central Administrative Tribunal in the case of a Government servant who has been found having extra-marital relations has not taken it to be serious or misconducts, unbecoming of Government servant on the ground that there is no law in our country which makes sexual relationship of two adult individuals of different sex, unlawful unless the relationship is adulterious or promiscuous. If a man and a woman are residing under the same roof and if there is no law prohibiting such a residence, what transpires between them is not a concern of their employer. Such a life, if accepted by the society at large, without any displeasure or grudge, then it cannot be said that there is any moral turpitude involved in the living. The Tribunal has gone to say further that in this case, there is no case that on account of the delinquent living with the lady, his reputation among the general public has been lowered or that, the public has been looking down on his conduct as an immoral one. The aforesaid observations and approach of the Central Administrative Tribunal has been disapproved by the Honourable Supreme Court in the said case.

24. In the case in hand, the delinquent-employee (deceased) was a Government servant in the police department in the State of Gujarat. The employees in the police department are under obligation for enforcement of law and order in the country and in case they themselves have come up with such character and conduct it has to be taken more seriously. They are also taken to have basic knowledge of law. In this case, the trial Court has accepted the findings of the inquiry officer as well as disciplinary authority that the deceased delinquent employee was keeping a mistress and that finding has not been challenged by the appellant in this appeal. Reliance placed by the learned trial Court on the decision of this Court was wholly erroneous in the facts of this case. Otherwise also, the decision of this Court on which reliance has been placed by the trial Court to decide the matter in favour of the deceased delinquent employee is not correct. Leaving apart whether in view of the later decision of Honourable Supreme Court the ratio of the case of this Court still holds field or not or stand any more, otherwise, also, that case is clearly distinguishable on the facts.

25. In the result, this appeal succeeds and the same is allowed and the judgment and decree of the City Civil Court No. 9, Ahmedabad, passed on 29th April 1988, so far it relates to second charge No. H/742/700 dated 28-4-1983, is quashed and set aside and the suit of the plaintiff is dismissed. No order as to costs.

26. Appeal allowed.